Filed 8/13/19 Johnson v. City of Oakland CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GLENDA JOHNSON et al., Plaintiffs and Appellants, v. CITY OF OAKLAND, Defendant and Respondent.	A153159 (Alameda County Super. Ct. No. RG17847847)

INTRODUCTION

Josephine Williams collapsed in the locker room of a swimming pool operated by the City of Oakland and was pronounced dead shortly after being transported to a local hospital. Plaintiffs, the sister and son of the decedent, filed the instant action against the City, claiming the lifeguards at the pool, who assisted Williams into the locker room after she fell onto the pool deck while climbing out of the water and then called 911, should have done more. The trial court concluded that while lifeguards must come to the aid of persons engaged in water activities in a pool, they, like other safety personnel, do not owe a duty to provide emergency services to other members of the public outside a pool. We agree, and affirm the judgment for the City.

BACKGROUND

Since this is an appeal from a dismissal following a demurrer, we recite the facts as alleged in the operative pleading.

In August 2015, Williams and her sister, plaintiff Glenda Johnson, went to a local city pool. On climbing out of the pool, Williams fell onto the pool deck. Three

lifeguards helped her to her feet, and one walked with her to an area in front of the women's locker room. While Williams leaned on the wall in front of the locker room, Johnson asked if the lifeguard could bring Williams some food. The lifeguard left and returned shortly with chips and ice tea. Williams, Johnson, and the lifeguard then went into the locker room.

Several minutes later, Williams said she was unable to breathe, fell to the floor of the locker room and became unresponsive. Johnson ran outside of the locker room, screamed for help and asked a lifeguard to call 911. The lifeguard did so.

During the 911 call, several lifeguards responded to questions by the dispatcher, stating they thought Williams had a diabetic condition and was fainting, and the "person with her" had asked them to call 911. When asked whether Williams was breathing normally, the lifeguard then on the phone stated she "really couldn't say" because she was not with Williams. Another lifeguard then told the dispatcher he did not know exactly what was happening, but something had happened in the locker room. He also said he did not know if Williams was breathing normally and called to the lifeguard who was previously in, and had apparently returned to, the locker room. That lifeguard yelled Williams was on her side, breathing slowly, and had something in her mouth, but was alert and not changing color. The lifeguard on the phone told the dispatcher he did not know if Williams had a history of heart problems and she was not breathing normally, but was " 'kinda like grunting.' " The dispatcher asked if there were lifeguards certified in CPR and he responded, " 'yes.' " The dispatcher asked the lifeguard to have someone meet the paramedics and show them where to go, to watch Williams and to call back if her condition got worse. No further call was made to 911.

The Oakland Fire Department appears to have been the first to arrive on the scene, having received an alarm at 8:37 p.m., and having arrived at 8:48 p.m. On arrival, Williams was " 'lying on the floor, unresponsive, pulseless and nonbreathing.' " There was no "bystander" CPR being performed. Fire department personnel immediately began CPR, "followed by mechanical CPR," and "it appeared Ms. Williams was aspirating."

Exactly when the paramedics arrived is unclear from the allegations. At one point, plaintiffs allege the paramedics were dispatched at 8:42 p.m., arrived at 8:54 p.m., and reached Williams at 8:56 p.m. Elsewhere, plaintiffs allege the paramedics arrived and assessed Williams at 8:43 p.m., at which time she was unresponsive, not breathing and without a pulse. "[A]mbulance personnel" suctioned her airway and inserted a device and measured her " 'absent respirations' " at 12 RPM. They also started an "IO" in her tibia, administered epinephrine, and ran an EKG, which showed no pulse. She was given two more does of epinephrine and transported to a local hospital, where further efforts were made to revive her. She was pronounced dead approximately 30 minutes later.

In their second amended complaint, plaintiffs abandoned earlier negligence theories of premises liability and negligent hiring. Rather, they asserted causes of action for wrongful death and negligent infliction of emotional distress based on respondeat superior liability on the part of the City for the alleged failure of the lifeguards to provide emergency services to Williams after she collapsed in the locker room. Specifically, plaintiffs alleged the lifeguards beached a duty to Williams by "among other things, failing to employ [CPR] . . . and failing to call 911 sooner."

Plaintiffs acknowledged "in general the law does not require a person to come to the aid of another," but alleged four exceptions: (1) statutes and regulations imposed a duty to assist Williams; (2) a "special relationship" gave rise to such duty; (3) the lifeguards had undertaken to assist Williams and were negligent in doing so; and (4) the lifeguards had "take[n] charge" of an "imperiled" Williams and had not exercised due care while caring for her.

The City demurred on the ground the lifeguards, like other public safety workers, owed no duty to provide emergency services to a general member of the pubic (in contrast to a person engaged in water activities who needs immediate assistance to keep from drowning). The City further asserted none of the alleged "exceptions" applied.

The trial court sustained the City's demurrer without leave to amend, ruling first that neither the Health and Safety Code, nor related regulations, requires lifeguards to provide emergency services to general members of the public. It secondly ruled that even

if the Health and Safety Code imposes a legal duty on a lifeguard to rescue a distressed swimmer, that duty does not extend to persons experiencing a non-water related medical emergency away from the pool. Third, the court ruled plaintiffs had not pleaded facts sufficient to establish the lifeguards had a "special relationship" with Williams giving rise to a duty of care to provide assistance.

DISCUSSION[1]

As we have recounted, plaintiffs' negligence claims against the City are predicated on the actions of the lifeguards who were at the pool at the time of the events in question. Thus, the issue is not whether the City, as a public entity, owed Williams a duty, but whether the individual lifeguards owed a duty to provide assistance to Williams for a non-water related medical emergency after she was no longer in, and was away from, the pool, rendering the City subject to vicarious liability. (See *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1180 (*Eastburn*).) Plaintiffs do not dispute that both their wrongful death and negligent infliction of emotional distress claims depend on the existence of such a duty.

Statutes and Regulations Pertaining to Lifeguards

Plaintiffs first maintain the trial court erred in concluding no statute or regulation imposed a duty on the lifeguards to come to the aid of Williams under the circumstances alleged in the operative complaint. They cite specifically to Health and Safety Code

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[1] Our standard of review of a dismissal following a demurer sustained without leave to amend is well-established. " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

sections 116028 and 116045, subdivision (a),[2] and to California Code of Regulations, title 22, section 65539.

Section 116028 provides:

> " 'Lifeguard service,' as used in this article, means the attendance at a public swimming pool, during periods of use, of one or more lifeguards who possess, as minimum qualifications, current certificates from an American Red Cross or YMCA of the U.S.A. lifeguard training program, or have equivalent qualifications, as determined by the department, and who are trained to administer first aid, including, but not limited to, cardiopulmonary resuscitation in conformance with Section 123725 and the regulations adopted thereunder, and who have *no duties to perform other than to supervise the safety of participants in water-contact activities*. *'Lifeguard services' includes the supervision of the safety of participants in water-contact activities by lifeguards who are providing swimming lessons, coaching or overseeing water-contact sports, or providing water safety instructions* to participants when no other persons are using the facilities unless those persons are supervised by separate lifeguard services." (Italics added.)

Section 116045, subdivision (a) provides:

> "(a) Lifeguard service shall be provided for any public swimming pool that is of wholly artificial construction and for the use of which a direct fee is charged. For all other public swimming pools, lifeguard service shall be provided or signs shall be erected clearly indicating that the service is not provided."

California Code of Regulations, title 22, section 65539, subdivisions (a)–(d) provides:

> "(a) If the pool operator provides lifeguard services, they shall be provided in accordance with Health and Safety Code sections 116028, 116033,[3] and 116045. The pool operator shall ensure that written proof of compliance with the certification requirements of Health and Safety Code sections 116028 and 116033 for each lifeguard is available for inspection by the enforcing agent at the public pool.
> "(b) Where lifeguard service is provided, the pool operator shall ensure lifeguards maintain *continuous surveillance of the pool users*.

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[2] All further statutory references are to the Health and Safety Code unless otherwise indicated.

[3] Section 116033 addresses "aquatic instruction."

> "(c) Lifeguards on duty *shall only provide lifeguard services as defined in Health and Safety Code section 116028*.
> "(d) Lifeguards shall wear swimming apparel that clearly identifies them as lifeguards to pool users." (Italics added.)

Under these provisions, a lifeguard's statutory and regulatory duty is defined as "supervis[ing] . . . the safety of participants in water-contact activities" (§ 116028), which is further defined as including "continuous surveillance of [] pool users" (22 C.F.R. § 65539) and supervising users while "providing swimming lessons, coaching or overseeing water-contact sports, or providing water safety instructions." (§ 116028.)

As the trial court pointed out, plaintiffs' allegations do not charge the lifeguards with any dereliction in carrying out their statutory and regulatory duty to supervise pool users engaged in "water-contact" activities.

Plaintiffs emphasize Williams was engaged in "water-contact" activities shortly before she collapsed in the locker room and maintain it makes no sense that had she sunk to the bottom of the pool, the lifeguards would have been duty-bound to come to her assistance, but having collapsed in the locker room, they no longer had a duty to do so.

However, the language of the pertinent statutes and regulation is explicit, and it does not speak in the past tense or in terms of persons who were, but no longer are, engaged in "water-contact" activities. Rather, the statutory and regulatory duty imposed on lifeguards is to stay focused on the pool area and to provide help to those in the pool who need assistance.

Plaintiffs maintain *Lindsey v. DeVaux* (1942) 50 Cal.App.2d 445 (*Lindsey*) is "directly on point." However, rather than supporting plaintiffs' claims here, *Lindsey* reinforces the limited scope of the statutory and regulatory duty imposed on lifeguards.

In *Lindsey*, an 11-year-old boy drowned while in a public swimming pool. The child's father sued, alleging, among other things, that contrary to applicable rules and regulations the lifeguard had been required "to perform *other* duties" beyond those attendant to lifeguarding and had " 'failed and neglected to supervise, watch, and guard the swimmers *in* said swimming pool,' " and as a result, the child drowned. (*Lindsey*,

supra, 50 Cal.App.2d at p. 447, italics added.) After the jury returned a verdict for the plaintiff, the defendants appealed, challenging the sufficiency of the evidence. (*Id.* at pp. 447–448.)

The Court of Appeal first observed that "[t]he law requires that one or more qualified life guards, *having no other duty to perform at the time*, shall be on life guard duty at each pool where admission is charged." (*Lindsey*, *supra*, 50 Cal.App.2d at p. 453, original italics omitted, seconds italics added.) This means, said the court, a lifeguard must be "one who has at least ordinary powers of observation, who is vigilant and attentive to duty, and who realizes that, particularly in a swimming pool in which young children are charged admission to swim, he should be watchful for any sign of distress or danger and quick to render assistance." (*Ibid.*) Although the evidence was by no means overwhelming, the court concluded there was enough evidence to support numerous inferences, including that the lifeguard was "*not present at the pool* when [the child] was struggling and in distress" and was not "in a position where he could observe to a reasonable extent, swimmers, and particularly children, *within the pool*." (*Id.* at p. 454, italics added.)

The court also rejected a challenge to a jury instruction that stated: " 'You are instructed that it is the duty of a life guard to use reasonable care and diligence in watching a public swimming pool and the persons using the same, so that he may, in case of an emergency, render reasonable assistance to one likely to drown." (*Lindsey*, *supra*, 50 Cal.App.2d at p. 456.) The court concluded this was a fair statement of the duty then imposed by regulation on lifeguards at public pools. (*Ibid.*)

In sum, there is nothing in *Lindsey* that advances plaintiffs' claims here. On the contrary, *Lindsey* illustrates that the statutory and regulatory duty imposed on lifeguards is vigilant focus on persons in the pool and rendering assistance when those persons appear to be in distress in order to avoid drownings.

Plaintiffs also rely on *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756. But their reliance is again misplaced. In *Haft*, a father and son drowned in a hotel swimming pool. After the jury returned a defense verdict, the plaintiffs, the surviving family members,

appealed. The issue before the Supreme Court was whether the plaintiffs carried their "initial burden of proof" on causation by showing the defendant had not complied with statutory and regulatory duties pertaining to the operators of public pools, including failing to provide a lifeguard or to post a sign that no lifeguard was on duty, failing to mark the water depth along the side of the pool, failing to warn that children were not to use the pool without adult supervision, and failing to post emergency contact telephone numbers. In short, said the court, "when measured against state safety standards, it would be difficult to find a pool that was more dangerous" than the pool in question. (*Id.* at pp. 761–763.) The high court went on to explain why the plaintiffs' showing, particularly that no lifeguard was present, was sufficient to "shift[]" the burden to defendants to show "the absence of a lifeguard did not cause the deaths." (*Id.* at p. 765.) Because this burden shifting analysis was "not clear" at the time the case was tried, the court reversed and remanded for a new trial. (*Ibid.*)

The instant case, in contrast, does not involve a drowning and, thus does not involve "water-contact" activity, in which the father and son in *Haft* were engaged. Nor does this case involve the derelictions in statutory and regulatory duties pertaining to the operation of public pools that were present in *Haft.* Nor does it concern the causation issue the Supreme Court addressed in that case—whether the derelictions in duty shifted the burden of proof on causation to the defendants. Rather, *Haft* further reinforces that lifeguards are to be present poolside to keep watch over persons in the pool to prevent drownings.

"Special Relationship"

Plaintiffs next maintain the trial court erred in concluding no "special relationship" existed between Williams and the lifeguards, giving rise to a duty to render emergency medical assistance when she collapsed in the locker room.

In *Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 (*Camp*), the Court of Appeal discussed at considerable length both the "general rule" pertaining to the rendition of aid and the "special relationship" exception thereto:

"The general rule is that, 'one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.' (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [(*Williams*)]. . . .) A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else. (*Eastburn* [, *supra,*] 31 Cal.4th [at p.] 1185 . . . ; see also *Zepeda v. City of Los Angeles* (1990) 223 Cal.App.3d 232. . . .) Thus [the officer] had no duty to even talk to the car's occupants, inquire about injury, or summon personnel to do a medical assessment. Liability may, however, be imposed 'if an officer voluntarily assumes a duty to provide a particular level of protection, and then fails to do so [citations], or if an officer undertakes affirmative acts that increase the risk of harm to the plaintiff.' (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129. . . .)

"California courts have found no duty of care and have denied recovery 'for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection.' (*Williams* [], *supra,* 34 Cal.3d at p. 25. . . .) Similarly, the Court of Appeal in *Zepeda* held 'paramedics had no general duty to render aid to [a gunshot victim]. . . . [T]he emergency personnel involved did not create the peril to [the victim], they did not voluntarily assume a special duty to assist him, they made no promise or statement to induce reliance, nor did they increase the risk to him that otherwise would have existed.' (*Zepeda v. City of Los Angeles, supra,* 223 Cal.App.3d at p. 236. . . .) [¶] . . . [¶]

"A duty of care may arise where the evidence demonstrates 'the requisite factors to a finding of [a] special relationship, namely detrimental reliance by the plaintiff on the officers' conduct, [or on] statements made by them which induced a false sense of security and thereby worsened [the plaintiff's] position.' (*Williams* [], *supra,* 34 Cal.3d at p. 28. . . .) A special relationship is not established 'simply because police officers responded to a call for assistance and took some action at the scene.' (*Adams v. City of Fremont* [(1998)] 68 Cal.App.4th [243,] 279. . . .) Nor is it 'enough to assert that the law enforcement officers took control of the situation.' (*Minch v. Department of California Highway Patrol* [(2006)] 140 Cal.App.4th [895,] 905.) Instead, special relationships have been found only in 'a limited class of unique cases' involving 'police officers who made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions [citation].' (*Adams,* at pp. 279–280.)" (*Camp, supra,* 184 Cal.App.4th at pp. 975–976.)

The court went on to explain there was no evidence of a "special relationship." The officer had not " 'voluntarily assume[d] a duty to provide a particular level of protection [to Camp], and then fail[ed] to do so. . . .' " (*Camp, supra*, 184 Cal.App.4th at p. 977.) "To the contrary," the record disclosed the officer "asked Camp whether she was injured and wanted an ambulance and then asked for her identifying information." (*Id*. at p. 978.) While this evidenced that the officer " 'responded to a call for assistance and took some action at the scene,' " (*ibid*., quoting *Adams v. City of Fremont*, *supra*, 68 Cal.App.4th at p. 279) that was "not sufficient to support a finding that [the officer's] affirmative acts increased the risk of harm to Camp. For example, there [was] no evidence that [the officer] told Camp he would take care of her, protect her, summon medical care for her despite her wishes, or help her in any other way. He did not order Camp to lie on the ground, physically move Camp himself, or order Medina to pick her up and carry her to Morales's car. He did not ignore any statement that Camp was injured or any request that an ambulance be called for her. Instead, he left Camp in the same position as she was in when he arrived at the scene." (*Camp*, at p. 978.) Nor was the officer's conduct in " 'managing the scene' " sufficient to create a duty of care. (*Ibid.*) "To create a special relationship and a duty of care, there must be evidence that the police 'made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions.' " (*Ibid.*, quoting *Adams v. City of Fremont*, at p. 280.)

Concluding there was no evidence the officer owed, let alone breached, a duty of care to provide assistance, the *Camp* court reversed a $2.6 million verdict for the plaintiffs and directed that judgment be entered for the State. (*Camp*, *supra*, 184 Cal.App.4th at p. 970.)

The allegations here are no different in substance than the circumstances in *Camp*. There are no allegations the lifeguards made any misrepresentations to Williams that induced her detrimental reliance, or that they placed Williams in harm's way, or that they lulled her into a false sense of security and withdrew essential safety precautions. On the

contrary, plaintiffs alleged Johnson first asked the lifeguard who had walked with Williams to see if she could find some food, which she did, and then yelled at the lifeguards to call 911, which they also did. In short, there are no allegations the lifeguards took any affirmative action sufficient to create a "special relationship" with Williams, giving rise to an obligation to provide emergency medical treatment when she collapsed in the locker room.

While plaintiffs cite to a panoply of cases, not one involves circumstances like those alleged here. For example, plaintiffs cite to *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 336, for the proposition that "under California law," a business "has a common law duty to provide at least some assistance to a patron who suffers a sudden cardiac arrest while shopping," and assert "operators of swimming pools [similarly] have a duty to assist swimmers who become ill or need medical attention." First, the issue here is not whether the City, as the operator of the public pool, owed Williams a duty; rather, the issue is the extent of the duty owed by the individual lifeguards. Secondly, while plaintiffs repeatedly characterize Williams as a "swimmer" or "pool user," they have not alleged that the lifeguards failed in their duty to vigilantly monitor "water-contact activities" or to provide assistance to those involved in such activities to prevent injury from or death by drowning.

Plaintiffs cite *Lucas v. Hesperia Golf & Country Club* (1967) 255 Cal.App.2d 241, for the proposition that "the relationship between swimming pool operators, lifeguards, and persons using pools create[s] a duty on the part of lifeguards to assist users in distress." *Lucas* is akin to, and in fact cites to, *Lindsey*, which we have discussed above. In *Lucas*, the plaintiffs' teenage son drowned in a pool that was neither attended by a certified lifeguard (only one, untrained person, who also provided pool maintenance, periodically checked on the pool), nor was posted with a sign warning that no lifeguard was on duty. (*Id.* at pp. 244–246.) Accordingly, *Lucas* provides no support for plaintiffs' reliance on the "special relationship" exception here; indeed, *Lucas* makes no mention of this exception. Plaintiffs' citation to *Rogers v. County of Los Angeles* (1974) 39 Cal.App.3d 857, is similarly unavailing. In *Rogers*, unknown persons at a beach

pulled the plaintiff, who was blue, bloated and not breathing, but whose heart was beating, from a "hard-breaking, three-to-five foot surf." (*Id.* at p. 859.) The lifeguards administered first aid and when revived slightly, the lifeguards pulled him to a sitting position when he complained of difficulty breathing and a friend told the lifeguards he suffered from asthma. The plaintiff again turned blue, his heart stopped, and the lifeguards immediately returned him to a supine position. (*Ibid*.) The plaintiff claimed that in moving him up and down, the lifeguards had caused the transection of his spinal cord, leaving him a partial quadriplegic. (*Id*. at p. 860.) Although the Court of Appeal affirmed a verdict for the city, plaintiffs here assert the court obviously "assumed" the "lifeguards owed a duty of care to the victim." Like *Lindsey* and *Lucas*, *Rogers* involved a near drowning and the lifeguards' efforts to revive the victim. *Rogers* makes no mention of the "special relationship" exception and thus also provides no support for plaintiffs' claim that the exception applies here.

Undertaking to Render Services

Plaintiffs additionally claim the lifeguards owed a duty to Williams because they undertook to assist her, citing principally to *Williams, supra*, 34 Cal.3d 18.

In *Williams*, the Supreme Court reaffirmed that a person ordinarily owes no duty to protect, assist or warn someone of a peril that he or she did not personally create. (*Williams, supra*, 34 Cal.3d at p. 23.) However, explained the court, if a person voluntarily undertakes to assist another person in peril (i.e., acts as a " 'good Samaritan' "), he or she must exercise reasonable care in doing so. (*Ibid.*) The specific issue in *Williams*, was "whether the mere fact that a highway patrolman comes to the aid of an injured or stranded motorists creates an affirmative duty to secure information or preserve evidence . . . between the motorist and third parties." The court concluded "stopping to aid a motorist does not, in itself, create a special relationship which would give rise to such a duty." (*Id.* at p. 21.)

In so holding, the high court contrasted *Mann v. State of California* (1977) 70 Cal.App.3d 773,[4] where officers came to the aid of a stranded motorist and placed their patrol cars so that the flashing lights would warn oncoming traffic, but then left the scene without warning, before the tow truck arrived. In that case, said the *Williams* court, "the officers' conduct contributed to, increased, and changed the risk which would have otherwise existed." (*Williams, supra*, 34 Cal.3d at p. 25.) *Mann* was thus illustrative of the duty "attaching to any volunteered assistance." (*Williams*, at pp. 25–26.)

In *Williams*, however, the officers engaged in no such conduct. "The officers did not create the peril in which plaintiff found herself; they took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed; there is no indication that they voluntarily assumed any responsibility to protect plaintiff's prospects for recovery in civil litigation. . . ." (*Williams, supra*, 34 Cal.3d at pp. 27–28.)

Likewise, here, the lifeguards did not "create" Williams' medical emergency. Nor did the lifeguards take any action that "contributed to, increased, or changed the risk" that otherwise existed. Nor did the lifeguards voluntarily undertake to provide any medical services for Williams; indeed, the gravamen of plaintiffs' claim is that the lifeguards rendered no assistance when she collapsed in the locker room. While the lifeguards assisted Williams when she fell climbing out of the pool and walked with her to the locker room, plaintiffs do not allege that these actions, in any respect, changed the risk Williams otherwise faced or affected her medical condition.[5]

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[4] Superseded by statute as stated in *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 283, footnote 31.

[5] Plaintiffs also cite to *Griffin v. County of Colusa* (1941) 44 Cal.App.2d 915. In that case, the plaintiff alleged she had been admitted to a county hospital and while "in a state of delirium from fever and illness, and while wholly unconscious," the defendants failed to render necessary medical care, including leaving her unattended during which time she fell out of bed and sustained injuries. (*Id.* at p. 917.) While the Court of Appeal affirmed dismissal as to the county and director of the hospital, it reversed as to the nurse defendants, stating "[t]he care and attention of plaintiff was personally entrusted to them." (*Id.* at pp. 923–924.) "When one has undertaken to render assistance or care,

"Taking Charge"

Plaintiffs lastly claim they adequately alleged that the lifeguards owed Williams a duty based on " 'tak[ing] charge' " of another who is "imperiled" or " 'unable to protect . . . herself.' " They cite only to Restatement Third of Torts, section 44.

While plaintiffs generally claim the lifeguards "took charge of Ms. Williams who was imperiled and helpless," they provide no elaboration. As far as we can discern, their "taking charge" theory is a recycling of their "undertaking to render services" theory, and it fails for the same reasons. Moreover, as we have observed, the courts have rejected the assertion that a first responder, such as a police officer, owes a duty to provide emergency assistance merely because he or she responds to a call and takes some action. (*Camp, supra,* 184 Cal.App.4th at p. 978 [officer's "conduct in 'managing the scene' is not sufficient to create a duty of care"].)

Plaintiffs make no claim that they can make further amendments that would overcome the deficiencies of their second amended complaint. Indeed, their second amended complaint alleges the bases for their claims in significant detail—the difficulty with their claims is not factual insufficiency, but legal insufficiency.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

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even if a volunteer, the law imposes a duty of care toward the person assisted." (*Ibid.*) The plaintiffs' allegations against the lifeguards here are not remotely comparable.

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Banke, J.

We concur:

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Margulies, Acting P.J.

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Sanchez, J.